BAHARUDDIN ALI & CO

v.

BPMB URUS HARTA SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-669-1998]
13 SEPTEMBER 2000

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Whether statement of claim discloses any cause of action against 2nd defendant - 2nd defendant an employee of 1st defendant - Whether there is any legal justification in citing 2nd defendant as a party*

CIVIL PROCEDURE: *Judgment - Default of defence - Application to enter judgment - Defence already in court's file - Whether too late*

The plaintiff commenced an action against the 1st defendant ("BPMB") and BPMB's general manager ("the 2nd defendant"). BPMB filed its defence on 10 November 1999. However, a day later, the plaintiff filed its application to enter judgment in default of defence against the 1st defendant. Meanwhile, the 2nd defendant filed an application to strike out the plaintiff's writ of summons and the amended statement of claim. The senior assistant registrar ("SAR") allowed the 2nd defendant's application and dismissed the plaintiff's application. The plaintiff appealed against the decision.

Held:

[1] The 2nd defendant was merely an officer of BPMB who performed his duties and obligations under his employment with BPMB. Thus, any redress that arose from the dispute should be against BPMB only and not against the 2nd defendant.

[2] The amended statement of claim did not disclose a cause of action against the 2nd defendant in his personal capacity. There was no factual situation entitling the plaintiff to obtain a remedy from the court against the 2nd defendant. Therefore, there was no legal justification whatsoever in citing the 2nd defendant as a party to the suit and the 2nd defendant should be struck out as a defendant forthwith.

[3] The plaintiff's application was academic since it was filed too late in the day as BPMB's defence was already in the court file.

[Appeal dismissed with costs.]

Case(s) referred to:

Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd [1985] 2 MLJ 165 ***(refd)***

Abu Bakar Haji Yusuf v. Mohamed Hamzah Hanapiah & Anor [1978] 2 MLJ 78 ***(refd)***

AG of Duchy of Lancaster v. L & N M Ry [1892] 3 Ch 278 ***(refd)***

Andrews 8 LS 14 ***(refd)***

Anlaby v. Praetorius [1888] 20 QBD 764 ***(refd)***

Bencon Development Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Ors [1999] 8 CLJ 37 ***(foll)***

Blay v. Pollard [1930] 1 KB 628 ***(refd)***

Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd [1915] AC 847 ***(refd)***

Esso Petroleum Co Ltd v. South Port Corporation [1956] AC 218 ***(refd)***

Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***

Hadmor Productions v. Hamilton [1983] 1 AC 19 ***(refd)***

Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 MLJ 10 ***(refd)***

Kepong Prospecting Ltd v. Schmidt [1968] AC 810 ***(refd)***

Kincaid [1989] CLJ 243 ***(refd)***

Lee v. Lee's Air Farming Ltd [1961] AC 12 ***(refd)***

Letang v. Cooper [1965] 1 QB 232 ***(refd)***

Lim Foo Yong & Sons Realty Sdn Bhd v. Datuk Eric Taylor [1990] 1 CLJ 415 ***(refd)***

Macaura v. Northern Assurance Co Ltd & Ors [1925] All ER 51 ***(refd)***

Millner 16 ICLQ 446 ***(refd)***

Ng Kian Chong & Ors v. Saw Seng Kee [1994] 4 CLJ 857 ***(refd)***

Pegler v. Craven [1952] 2 QB 69 ***(refd)***

Price v. Easton [1833] 4 B & Ad 433 ***(refd)***

Republic of Peru v. Peruvian Guano Co [1887] 36 Ch D 489 ***(refd)***

Robertson v. Howard [1878] 3 CPD 280 ***(refd)***

Salomon v. Salomon & Co Ltd [1897] AC 22 ***(refd)***

Scammell [1955] CLP 131 ***(refd)***

The Chartered Bank v. Yong Chan [1974] 1 MLJ 157 ***(refd)***

Thorp v. Holdsworth [1876] 3 Ch.D 637 ***(refd)***

Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd [1988] 165 CLR 107 ***(refd)***

Vu Siew Chin v. Wong Fah Yoon [1982] 2 MLJ 221 ***(refd)***

Wenlock v. Moloney [1965] 1 WLR 1238 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19 (1)(a), (2)
Companies Act 1965, s. 16(5)

Other source referred to:
Halsbury's Statutes, 4th edn, vol 23 p 144

For the plaintiff - Mohd Roshali Mohd Rasidi; M/s Baharuddin Ali & Co
For the defendants - Umma Hasnah Mohd Yasin; M/s Nordin Torji & Yussof Ahmad

Reported by Izzaty Izzuddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal by the plaintiff in encl. 20 to the judge-in-chambers against the decision of the senior assistant registrar ("SAR") dated 9 March 2000. The appeal in encl. 20 may be divided into two parts. The first part was in regard to the decision of the SAR who had allowed with costs the second defendant's application in encl. 16 to strike out the writ of summons dated 21 October 1998 and the amended statement of claim bearing the same date (both can be seen in encl. 5) under O. 18, r. 19 (1)(a) of the Rules of the High Court, 1980 ("RHC") which states as follows:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or

and according to O. 18, r. 19(2) of the RHC:

> No evidence shall be admissible on an application under paragraph (1)(a).

That no evidence is admitted on an application to strike out under O. 18 r. 19(1)(a) of the RHC has indeed been borne out in two prominent cases. Firstly, *A.G. of Duchy of Lancaster v. L. & N. M. Ry* [1892] 3 Ch 278 and, secondly, *Republic of Peru v. Peruvian Guano Co.* [1887] 36 Ch.D 489, 498. Even in a situation where the statement of claim was sought to be struck out as it disclosed no reasonable cause of action because it was unlikely to succeed, affidavit evidence was said to be inadmissible (*Wenlock v. Moloney* [1965] 1 WLR 1238, [1965] 2 All ER 871, C.A.).

The second part of the appeal in encl. 20 was in regard to the application by the plaintiff to enter judgment in default of defence against the first defendant and this application was also dismissed by the SAR.

Now with these principles and background in mind, I will now proceed to the heart of the matter.

Amended Statement of Claim

In the amended statement of claim, the plaintiff has been described as a legal firm with an address at Level 10, Menara Bank Pembangunan, Jalan Sultan Ismail, 50250 Kuala Lumpur. The first defendant is said to be a subsidiary company belonging to Bank Pembangunan Malaysia Berhad with an address at Level 10, Menara Bank Pembangunan, Jalan Sultan Ismail, 50250 Kuala Lumpur. While the second defendant one Jamil bin Poniran is described as a general manager of the first defendant.

The plaintiff rents an office space at premises known as Level 10, Menara Bank Pembangunan, Jalan Sultan Ismail, 50250 Kuala Lumpur (hereinafter referred to as the "office premises") and the first defendant is a company which manages the office premises. It has been said that the first defendant and/or on the instructions of the second defendant had committed the following acts:

(a) On 13 March 1998 disconnected the electricity supplies to the office premises;

(b) On 12 June 1998 had caused the disconnection of the electricity supplies to the office premises or refused to re-connect the electricity supplies to the office premises and thereafter, in stages, disconnected or refused to re-connect electricity supplies on 13 June 1998, 14 June 1998 and 15 June 1998;

(c) On 13 June 1998 had obstructed and prevented the plaintiff's electrical contractor from carrying out checks on the office premises for the purpose of re-connecting the electricity supplies to the office premises;

(d) On 13 June 1998 had obstructed an employee of the Tenaga Nasional Berhad ("TNB") from carrying out checks for the purpose of re-connecting the electricity supplies to the office premises;

(e) On 14 June 1998 at about 5.35pm, the first defendant directed the security guards to prevent Haji Baharuddin bin Haji Ali, a partner of the plaintiff's legal firm, from entering the office premises;

(f) On 16 June 1998 had obstructed and prevented the plaintiff's electrical contractor from carrying out electrical checks and examinations on the office premises in order to prevent disturbances to the supply of electricity therein;

(g) By letter dated 16 June 1998 issued threats to the plaintiff;

(h) Had acted independently, contrary to the laws of the country which resulted in considerable loss to the plaintiff, by preventing the plaintiff from carrying out its legal practice in an orderly manner. Had also caused unreasonable difficulties and subjected the plaintiff to considerable uneasiness.

By and large, it was submitted that the plaintiff's business and well being were badly affected. All these were said to have greatly affected the partners, staff and clients of the plaintiff.

By letter dated 7 August 1998, the plaintiff claimed against the defendants but the latter refused to accede to the plaintiff's claims. Consequently, the plaintiff filed a suit and claimed for:

(a) A sum of RM1,025 as special damages which made up of:

(i) payment to two electrical contractors	…	RM110
(ii) payment for one manual typewriter	…	RM250
(iii) transport charges	…	RM320
(iv) payments for alternative amenities which included telephone, fax, fotostat machine and others	…	RM345
		RM1,025

(b) General damages computed at RM2,635,343 for the following matters:

(i) the good name and image of the plaintiff's legal firm affected and smeared;

(ii) the plaintiff was unable to operate and activate its legal practice due to the various actions undertaken by the defendant (here no mention which particular defendant);

(iii) the mental, emotional and physical disturbances experienced by the partners and employees of the plaintiff;

(iv) the unreasonable uneasiness experienced by the plaintiff's clients.

(c) Costs in the said action and the legal fees thereto; and

(d) Any other relief that this court feels fit and proper.

In *Abu Bakar bin Haji Yusuf v. Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78, the court, *inter alia*, held that where the allegation was that the statement of claim disclosed no reasonable cause of action, only the plaint and its documents alone should be considered and all allegations in it should be assumed to be true. In short, the matter should be resolved upon the allegations contained in the pleadings and that evidence in support of the applicant's case was said not to be admissible. Basically, pleadings are statements in writing drafted and filed setting out the facts and issues in order to tell the opposite party what was the case all about and for the opposite party to respond by drafting and filing a defence thereto. Within the ambit and scope of the word "pleadings" would comprise the whole gamut of the statement of claim, the statement of defence and counterclaim, the reply to the statement of defence and counterclaim, the statement of claim indorsed on a writ of summons together with further and better particulars of the pleadings. The cases of *Anlaby v. Praetorius* [1888] 20 QBD 764 and *Robertson v. Howard* [1878] 3 C.P.D. 280 categorically stated that a statement of claim indorsed on the writ should be considered as a pleading. The importance of pleadings have been sufficiently considered in *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157; *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196; *Thorp v. Holdsworth* [1876] 3 Ch.D 637; *Esso Petroleum Co Ltd v. South Port Corporation* [1956] AC 218; *Blay v. Pollard* [1930] 1 K.B. 628; *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10; and *Hadmor Productions v. Hamilton* [1983] 1 AC 191 and I do not propose to add anything new to it. Suffice for me to say that an experienced draftsmen in drafting the pleadings would surely assist the courts in adjudicating the issues with ease because those issues would, by then, be identified with some measure of certainty. In short, the pleadings must be shaped and fashioned in the context of the experience and familiarity with the law on the part of the draftsmen. Inefficient preparation of pleadings would invariably result in dire consequences.

In the present appeal, from the court file only the first defendant filed the statement of defence as seen in encl. 13. Briefly, the statement of defence averred that the first defendant issued written notices to the plaintiff to settle the outstanding rentals of the offices premises. Verbal warnings were also extended to the plaintiff but all these came to nought. The plaintiff persisted in refusing to pay the outstanding rentals. It was averred that the outstanding rentals from the month of May 1998 until April 1999 came

up to RM71,694.20. The first defendant had no choice but to advise Bank Pembangunan dan Infrastruktur Malaysia Berhad – the owner of the building wherein the office premises was located, to institute distress proceedings against the plaintiff. It was the averment of the first defendant that it had acted, at all material times, within the bounds of the law to collect the rentals from all the tenants in the building including the office premises where the plaintiff had rented. The first defendant categorically averred that:

(i) the office premises had experienced several electrical failures due to problems associated with "tripping" and this was due to the bad wiring systems that were installed there;

(ii) tight security measures were undertaken to ensure that any electrical works undertaken be monitored as it would affect the whole building and access would be provided to authorised TNB workers or contractors as authorised by TNB; and

(iii) instructions were issued by the first defendant to all its security personnel to prevent tenants of the building who were in arrears of their rentals from removing their office equipments from the building and these instructions were issued in the interest of the owners of the building.

The first defendant averred that the distress proceedings to recover RM71,694.20 against the plaintiff ran counter to the claim by the plaintiff that it had a good name and image to maintain. The distress proceedings would not be instituted and the image of the plaintiff as a legal firm will not be affected had the plaintiff, in the first place, paid the monthly rentals of the office premises promptly and punctually – this was the averment of the first defendant as I understood them to be. I must at once say that the pleadings were not happily worded. There was no mention in the amended statement of claim as to the existence of a tenancy agreement between the plaintiff and the owner of the building which must necessarily include the office premises. There was also no mention in the amended statement of claim as to whether there was an agreement between the plaintiff and the first defendant wherein the latter managed the office premises as authorised by the owner of the building. It would be difficult to conjecture as to the existence of the tenancy agreements between the parties. But for the purpose of the present appeal, my duty was simply to decide on the fate of the second defendant in so far as the plaintiff's appeal in encl. 20 was concerned.

I must proceed on the premise that the second defendant was only an employee of the first defendant and whatever the second defendant did, it was done at the behest of the first defendant. This would be the correct appraisal of the facts as alluded to in the amended statement of claim.

All the parties proceeded on the premise that there was a landlord tenant relationship between the plaintiff and the owner of the building wherein the office premises was located, on the one hand, and, on the other hand, that landlord tenant relationship incorporated the role of the first defendant as the party responsible for the management of the building wherein the office premises was located to the exclusion of the second defendant. That kind of relationship must be governed by the doctrine of privity of contract and, for this reason, it would now be ideal to examine that doctrine in the context of the facts of the present appeal.

No Privity Of Contract

Now, it must be borne in mind that as the general manager of the first defendant, all the actions and instructions issued by the second defendant were so done in the official capacity of the second defendant and at the behest of the first defendant. The role of the second defendant was only as an employee and it would be correct to say that there was no privity of contract between the plaintiff and the second defendant. The main actor in the whole episode was the first defendant. In the case of *Kepong Prospecting Ltd v. Schmidt* [1968] A.C. 810, the Privy Council had occasion to consider the principle of privity of contract. In that case, a third party filed a claim to enforce a contract under the law of Malaysia, where consideration need not move from the promisee. In rejecting outright such a claim, the Privy Council aptly said at p. 826 of the report:

> It is true that section 2(d) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties.

Way back in 1833 in the case of *Price v. Easton* [1833] 4 B. & Ad. 433, the court there held that the plaintiff who was not a party to the contract was said to be unable to recover since an action for breach of contract must be instituted by the person from whom the consideration moved. Lord Haldane L.C. in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd* [1915] AC 847, 853 in perfect English said:

> In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam.*

Unfortunately, textbook writers were not happy with the doctrine of privity and this was more pronounced in a situation where third parties were outrightly prevented from recovering under the contracts even though those contracts were made for their benefit (see for example *Millner 16 ICLQ* 446; *Scammell* [1955] CLP 131; *Andrews 8 LS 14* and *Kincaid* [1989] CLJ 243). Even the majority of the High Court of Australia in the case of *Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd* [1988] 165 CLR 107, [1988] 80 ALR 574 rejected the privity doctrine. In Malaysia, however, the decision of Gunn Chit Tuan SCJ in *Lim Foo Yong & Sons Realty Sdn Bhd v. Datuk Eric Taylor* [1990] 1 MLJ 168 at 170, (1990) 1 CLJ 415 at 418, (1990) 1 SCR 309 at 315 would serve as a good guideline. There his Lordship said:

> …. only a party to the contract or the deceased plaintiff's estate is entitled to compensation for loss or damage caused by a breach of contract under section 74(1) of the Contracts Act 1950. In our judgment, the word 'party' in the said section can only mean a party who was a signatory to the contract or his estate. In this case the deceased plaintiff's wife, as administratrix of the estate of her deceased husband, could prove and obtain compensation for any loss suffered by the deceased or his estate but not for any loss suffered by her in her personal capacity.

Applying the privity principle, it was my judgment that any redress that arose from the dispute should be against the first defendant only and not against the second defendant. In my judgment, the second defendant was merely an officer of the first defendant who had performed his duties and obligations under his employment with the first defendant.

The second defendant can rightly be described as an employee of the first defendant and so the second defendant as a general manager of the first defendant had to act on behalf of his company – the first defendant. The second defendant must act according to the instructions of the first defendant. It cannot be said that the second defendant was capable of being sued in his personal capacity unless there was evidence to that effect. But alas, the amended statement of claim as alluded to earlier merely described the second defendant as the general manager of the first defendant and it further averred, for fear of repetition, that the "first defendant and/or on the instructions of the second defendant had committed the following acts."

The amended statement of claim clearly showed beyond per adventure that the second defendant had acted in his capacity as the general manager of the first defendant and that instructions were given by the first defendant to the second defendant in the second defendant's capacity as the general manager of the company – the first defendant. It must be emphasised that the amended statement of claim did not state that the second defendant had committed the act in his personal capacity or for that matter that the second defendant himself in his own personal capacity had committed those acts as alleged by the plaintiff. This was my judgment and I so hold accordingly. It was also my judgment that the amended statement of claim did not disclose a cause of action against the second defendant in his personal capacity. In the words of Lord Diplock L.J. in *Letang v. Cooper* [1965] 1 QB 232 at 242 a "cause of action" would simply mean that "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". And in the context of the present appeal, there was no factual situation entitling the plaintiff to obtain from this court a remedy against the second defendant.

In *Bencon Development Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385, the court had to consider whether the proper parties were being sued, namely, whether the second defendant (JKR) and the third defendant (Kerajaan Negeri Pulau Pinang) should have been made parties in the proceedings. The court ruled that the decision to approve or not to approve, with or without conditions and what conditions to impose, was entirely the decision of the first defendant. No doubt the first defendant may and should take and obtain technical advice from other relevant government departments, yet what the first defendant did was just like taking into account the views of its own employees. That being the case the court held that there was no legal justification for the second and the third defendants to be made parties to the suit and that they should be struck out as defendants forthwith. Of course, factually the facts in *Bencon Development Sdn Bhd v. Majlis Perbandaran Pulau Pinang & Ors (supra)* were different from the present appeal but the principles enunciated therein are certainly germane and applicable. It can therefore be said, taking the principle enunciated in that case to the present appeal, that there was no legal justification whatsoever in citing the second defendant as a party to the suit and the second defendant should be struck out as a defendant forthwith.

In *Ng Kian Chong & Ors v. Saw Seng Kee* [1994] 3 MLJ 691, the appellants had succeeded in showing that the wrong parties were cited and the appellants had also shown that there was no contract between them and the respondent. It was the registrar of the Pahang Investments Public

Ltd Co ("PI") who had issued the shares and if those shares were invalid, then the right party to sue would be PI and not the appellants. In the context of the present appeal, the right party to sue would be the first defendant and not the second defendant. This was my judgment and I so hold accordingly.

This brings me to a very interesting topic of the day and that would be in regard to the doctrine of a separate legal personality.

Separate Legal Personality

It simply means that a registered company is a different legal person from its members. A company is said to be a corporation and in the eyes of the law – in the true legal sense, a company is quite distinct from the individuals who are its members. Thus, a company, as a distinct person, can own property, have rights and be subject to liabilities. In *Pegler v. Craven* [1952] 2 QB 69, [1952] 1 All ER 685 the plaintiff was the tenant of a shop and the flat above under the Leasehold Property (Temporary Provisions) Act, 1951 (now replaced by the Landlord and Tenant Act 1954, Part II which is to the same effect as seen in *23 Halsbury's Statutes* (4th edition) 144). A business was carried out in the shop by a company of which the plaintiff was the managing director and a majority shareholder. The court held that the plaintiff was not entitled to apply to the court for a renewal of his tenancy under the statutory provision of the Leasehold Property (Temporary Provisions) Act, 1951 in order to protect the business because the plaintiff was not "the occupier of a shop under a tenancy" as envisaged under the Leasehold Property (Temporary Provisions) Act, 1951. It seemed that the company occupied the shop as a mere licensee of the plaintiff and not as a sub-tenant and that being the case the court proceeded to say that the company too was disabled from seeking a renewed tenancy.

As an artificial legal person, the company will live long and it cannot die. Directors, secretaries and managing directors would come and go but the company remains in existence. The company continues to exist even if all its members expire. The continuance of the company can never be doubted until and unless it is struck off the register of companies pursuant to the procedures as set forth under the Companies Act, 1965. As a separate legal person, a company has the capacity to enforce all its rights by itself, in its own name as envisaged in *Foss v. Harbottle* [1843] 2 Hare 461, 67 ER 189. The company too may incur liabilities and in the process may even be sued. The liabilities of the company are strictly that of the company and not that of its members.

At this juncture, the celebrated case of *Salomon v. Salomon & Co Ltd* [1897] AC 22, [1895] 2 Ch 323 come to the forefront. In that case, Salomon was for many years carried on the business of a boot and shoe manufacturer by himself and under the style of a firm known as 'A Salomon & Co'. Later as the years rolled by, Salomon converted his business into a company. There was evidence that the business was solvent at the time of conversion. The memorandum was subscribed and the subscribers were none other than Salomon, his wife and five of his children. The business was sold to the company for a sum of over 40,000 pounds. Out of that sum, 9,000 pounds was paid in cash while 20,000 shares made up of 1 pound each were allotted to the subscribers as being fully paid for. The balance of 10,000 pounds was owed by Salomon and he conveniently took debentures for the sum which was secured by a charge on the company's property. Somehow, the boot and shoe trade was hit by depression, and the company faced financial difficulties. The debentures belonging to Salomon were cancelled and they were re-issued in favour of one Broderip. In due course, the company went into liquidation. The debentures could not be paid in full. It turned out that the unsecured creditors got nothing at all. The liquidator took a cudgel and disputed the validity of the debentures on the sole ground of fraud. The liquidator too claimed rescission of the agreement for the transfer of the business and also sought to cancel the debentures and repayment by Salomon of the balance of the purchase money. The liquidator also sought, by way of an alternative claim, for the repayment of 20,000 pounds on Salomon's shares on the basis that nothing had been paid for those shares. At p. 30 of the report, Lord Halsbury remarked in these simple words:

> … I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence – quite apart from the motives or conduct of individual corporators. In saying this I do not at all mean to suggest that if it would be established that the provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

At p. 70 of the report, Lord Macnaghten said: *a*

> … In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent *b* or unconnected, ….. or that they should have a mind and will of their own, as one of the learned Lords Justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter. *c*

Further down the same page of the same judgment, Lord Macnaghten continued in serious vein:

> … The company is at law a different person altogether from the subscribers to the memorandum; and though, it may be that after incorporation the business is *d* precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned *e* judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Section 16(5) of the Companies Act, 1965 enacts as follows:

> On and from the date of incorporation specified in the certificate of incorporation but subject to this Act the subscribers to the memorandum together with such *f* other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the *g* assets of the company in the event of its being wound up as is provided by this Act.

and it clearly sets out the principle that a company is a legal person, a separate legal entity from its members. The members of the company may totally change or all the members of the company may die but the legal *h* entity of the company remains intact. The company will always remain liable for its debts and the liability of its members will be confined and limited to the quantum of the shares which the members subscribe. As a body

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corporate, the company is "capable forthwith of exercising all the functions of an incorporated company." The phrase "and of suing and being sued" appearing in s. 16(5) of the Companies Act, 1965 simply means that the company is liable under the law to incur debts and the company too may sue or be sued in its own name. But a caveat must be imposed. The members and directors of the company are not and cannot be held personally liable for its debts. There is however a passage emanating from the Federal Court in 1981 in the case of *Vu Siew Chin v. Wong Fah Yoon* [1982] 2 MLJ 221 where Wan Suleiman F.J. was of the view, to paraphrase his Lordship, that the law gave leeway to a person – the sole owner of the company, to be sued in the company's name. In regard to the phrase "separate legal entity" appearing in s. 16(5) of the Companies Act, 1965, the case of *Salomon v. Salomon & Co Ltd (supra)* should be the starting point. For fear of repetition, Salomon was held not to be liable for the debts of his company even though he was the *de facto* controller of the company. This meant that any company can legally and validly enter into a good binding contract with its *de facto* controller (*Lee v. Lee's Air Farming Ltd* [1961] AC 12). According to the case of *Abdul Aziz bin Atan & 87 Ors. v. Ladang Rengo Malay Estate Sdn Bhd* [1985] 2 MLJ 165, the personality of the company survives despite changes in the membership of the company.

But the principle of a separate legal personality, would also cause a problem to the owner of the company as exemplified in *Macaura v. Northern Assurance Co. Ltd & Ors* [1925] All ER 51. In that case, the court held that since Macaura had assigned the interest which he originally owned to a company formed by him, he no longer had an insurable interest in the company even though he owned all the shares in that company. The court further held that a shareholder had no legal or even equitable interest in the property of the company. It would be ideal to briefly state the facts in the case of *Macuara v. Northern Assurance Co. Ltd & Ors (supra)*. There, Macaura owned land with existing timber on it; and he sold the land together with the timber to a company which he himself formed and, by way of a consideration, he received all the fully paid shares of the company. Earlier on, Macaura insured the timber against fire with various insurance companies. But unfortunately, a fire broke out and destroyed a great portion of his timber and Macaura promptly instituted actions against the insurance companies to recover his loss. The court refused to entertain him and dismissed his claim forthwith.

In the context of the present appeal, the second defendant was not holding any shares in the first defendant. The second defendant was a mere conduit pipe to facilitate the management of the office premises which the first defendant was supposed to manage. The second defendant too was not like Macaura nor like Salomon. The second defendant was a mere employee who held a high sounding position – that of a general manager of the first defendant. As I said, employees of a company come and go and the company will still remain. Here too, in the event the second defendant's services were terminated by the first defendant, the second defendant must leave the first defendant. In its correct perspective, as an employee what the second defendant did was merely at the behest of the company – the first defendant, and the second defendant cannot be held personally accountable for his acts. The SAR in the person of Hajjah Wan Azizon binti Ahmad had appraised the law well and she was right in allowing the second defendant's application in encl. 16 to strike out the writ of summons dated 21 October 1998 and the amended statement of claim of the same date under O. 18, r. 19(1)(a) of the RHC. This was my judgment and I so hold accordingly. In regard to the first part of the appeal in encl. 20 by the plaintiff, the appeal should be dismissed. The second defendant should be struck off as a party to the suit. At the trial, if the plaintiff intends to advance its case well, the option to subpoena the second defendant – Jamil bin Poniran, was still available to the plaintiff. It was also part and parcel of my judgment that the second defendant was wrongly cited as a party to the proceedings because the amended statement of claim as alluded to in the early part of this judgment did not disclose a cause of action against the second defendant at all. That amended statement of claim averred in clear terms that the culprit was the first defendant who had committed the alleged acts as alluded to earlier. The second defendant's role in the whole episode as reflected in the amended statement of claim was greatly marginalised by the preponderance of the first defendant. Indeed, the tenor of the plaintiff's counsel's submission showed that it was the first defendant who had committed the act of disconnecting the electricity supply to the office premises. It was wrong and entirely off target to submit that the second defendant had violated his duties by acting arbitrarily for the simple reason that such a serious allegation was not borne out by the amended statement of claim.

In regard to the second part of the appeal in encl. 20, the SAR too was right in dismissing it. In my judgment, the application by the plaintiff to enter judgment in default of defence against the first defendant was now academic. In fact, the first defendant had filed a statement of defence

which was dated 10 November 1999 as seen in encl. 13. The plaintiff, on the other hand, had filed an application to enter judgment in default of defence against the first defendant and that application was dated 11 November 1999 as seen in encl. 12. It would therefore be apparent that encl. 12 was filed too late in the day bearing in mind that encl. 13 was already in the court file.

Conclusion

For the reasons adumbrated above, I dismissed the plaintiff's appeal in encl. 20 with costs.